No. 78-1133

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

DER-RONG CHOUR, PETITIONER

v.

BENEDICT J. FERRO, ET AL.

DER-RONG CHOUR, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of two decisions of the court of appeals. His petition is jurisdictionally out of time with respect to one decision, and the only issue raised with respect to the other decision is without merit.

These cases arise out of petitioner's persistent but ultimately unsuccessful attempts to resist enforcement of a deportation order.[1] The history of the deportation order is stated in our Brief in Opposition in No. 77-645, *Chour* v.

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[1]See *Chour* v. *Ferro*, 573 F. 2d 1289 (2d Cir. 1977), cert. denied, 434 U.S. 1063 (1978).

Ferro, a copy of which we sent to petitioner at the time it was filed in that case. Following this Court's denial of certiorari in that case,[2] petitioner was deported.

The first decision that the present petition seeks to have this Court review is *Chour* v. *INS*, 578 F. 2d 464 (2d Cir. 1978) (see Pet. App. A-3 to A-20). Petitioner contends that the court of appeals improperly reviewed his request for a stay of deportation (Pet. 28-44) and improperly assessed a fine of $1000 and double costs against petitioner and his attorney (Pet. 44-72). The decision in that case was entered April 28, 1978 (Pet. App. A-3). The court of appeals denied a post-judgment motion on September 15, 1978 (Pet. App. A-21 to A-22). Even assuming *arguendo* that the post-judgment motion was a petition for rehearing, the time for filing a petition for a writ of certiorari was not extended and, accordingly, the 90-day period provided by 28 U.S.C. 2101(c) expired on December 14, 1978. The petition was filed on January 18, 1979, and is therefore out of time. The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923).

The other case that petitioner seeks to have this Court review is *Chour* v. *Ferro*, No. 78-6034 (2d Cir. Nov. 22, 1978) (Pet. App. A-1 to A-2). There, the district court dismissed petitioner's complaint seeking money damages from officials of the INS and an injunction against his deportation, and the court of appeals summarily affirmed. The only claim petitioner raises is that the district court erred in dismissing the complaint *sua sponte* (Pet. 15-28). But as the court of appeals correctly noted (Pet. App. A-2), the district court dismissed the complaint on the oral request of the United States and only after petitioner had been notified and had replied. Therefore, the question petitioner

[2]See note 1, *supra*.

seeks to raise is not presented on this record. In any event, a district court's authority to dismiss a complaint *sua sponte* is well established. *Dougherty* v. *Harper's Magazine Co.*, 537 F. 2d 758 (3d Cir. 1976); *Literature, Inc.* v. *Quinn*, 482 F. 2d 372 (1st Cir. 1973); *Dodd* v. *Spokane County*, 393 F. 2d 330 (9th Cir. 1968).

It is therefore respectfully submitted that the petition for writs of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979